

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1263

77-1263

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

DANIEL YODER,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

JAMES P. HARRINGTON
Attorney for Appellee
Office and P.O. Address
474 Statler Hilton
Buffalo, New York 14202
Phone: (716) 855-3391



INDEX TO BRIEF

Preliminary Statement	1
Questions Presented	4
Statement of Facts	4
Argument	8
Point I - The Defendant had asserted his Sixth Amendment right and the government did not meet its "Heavy Burden" to show a knowing and intelligent waiver	10
Point II - The statements made and the evidence seized after the defendant's initial appearance were properly suppressed	12
Conclusion	14

TABLE OF CASES

<u>Kirby vs. Illinois</u> , 406 U.S. 682, 689 (1972)	10
<u>Faretta vs. California</u> , 422 U.S. 806, 835 (1975) ..	10
<u>Johnson vs. Zerbst</u> , 304 U.S. 458, 464-465 (1938)...	10
<u>Michigan vs. Moseley</u> , 423 U.S. 96, 110 (1975)	10
<u>U.S. vs. Clark</u> , 499 F. 2d 802 (4th Cir., 1974)	10
<u>U.S. vs. Satterfield</u> , Docket No. 76-1372, 2nd Cir., December 7, 1976	11

STATUTES

18 U.S.C.

Section 2113(a) and Section 2		1
Section 2113(b) and Section 2		1

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

DANIEL YODER,

Defendant-Appellee.

BRIEF OF APPELLEE

PRELIMINARY STATEMENT

The Defendant, DANIEL YODER, was indicted with his brother, Michael Yoder, and Brian Buchanan, on November 17, 1976 and charged with two counts of violations of 18 U.S.C., Section 2113(a), and Section 2 and one count for a violation of 18 U.S.C., Section 2113(b) and Section 2. All three counts stemmed from the robbery of a bank in Strykersville, New York on October 20, 1976.

All three defendants made motions to suppress statements made by them to F.B.I. agents and a suppression

hearing was held before the Hon. John T. Elfin, United States District Court Judge, on January 3, 7, 18, and 19, 1977 and oral argument was scheduled for Monday, January 31, 1977, after the submission of briefs by the parties. On the date of the oral argument, the Buffalo area was in the grips of severe winter conditions, but the Judge insisted that the argument proceed. The Assistant U.S. Attorney was unable to get to Court. (Two of the defense attorneys arrived on cross-country skis.) After oral argument that day, the Court denied the motions to suppress of the Defendants, Brian Buchanan and Michael Yoder, and granted the motion of the Defendant, Daniel Yoder.

Thereafter, on February 23, 1977, the government made a motion for a re-hearing and re-argument of the Court's suppression decision on Daniel Yoder and requested that the Court make Findings of Fact and Conclusions of Law.

The Court filed its Memorandum and Order on June 17, 1977 indicating that the Court had re-considered its decision with respect to Daniel Yoder and still came to the same conclusion, and therefore, granted the motion to suppress after setting forth its Findings and Conclusions.

On June 23, 1977, the government filed a Notice of Appeal which brings the Court's decision on the suppression of Daniel Yoder's statements and evidence seized from him before this Court.

QUESTIONS PRESENTED

I. Whether the F.B.I. agents violated the Defendant's Sixth Amendment rights after repeated requests for counsel.

II. Whether information and evidence seized during an arraignment postponed overnight for the assignment of counsel was tainted by pre-arrangement conduct of F.B.I. agents.

STATEMENT OF FACTS

Daniel Yoder was arrested on November 18, 1976 at approximately 12:20 P.M. by agents of the Federal Bureau of Investigation (F.B.I.) pursuant to a bank robbery¹ indictment warrant at his apartment in Sardinia, New York. (Government's appendix pp. 21-23, 162. Hereinafter, all references are to Government's appendix unless otherwise indicated.) Daniel Yoder had no prior criminal arrest

¹(This bank robbery took place at the Strykersville Office of the Wyoming County Bank. There were three participants who entered the bank through the ceiling and waited for bank workers to arrive in the morning. The participants wore masks and escaped with approximately \$17,000 shortly after bank workers arrived. See Defendant Yoder's Appendix pp. 1 through 7).

record (38, 154). After being informed of his arrest, who was arresting him and being allowed to dress, he was taken to an F.B.I. car waiting outside his apartment (21-23, 162). He was advised of his rights by Thomas Langer, Special Agent of the F.B.I., and refused to waive those rights either orally or by signing a written waiver (85-86, 146). Shortly thereafter, another Special Agent, Thomas Gray, who had participated in the earlier arrest, joined Daniel Yoder in the F.B.I. car. He inquired whether Daniel Yoder had been advised of his "Miranda" rights and then asked if he wished to make a statement (23, 147). Daniel Yoder again refused (23).

Gray then directed Special Agents Charles Patrick and Thomas Langer to transport Yoder to the F.B.I. office in Buffalo, New York (23). This trip took approximately one hour (98, 135). During the trip, the agents said there was some conversation, but it was small talk and did not pertain to the bank robbery (98, 135-136). Daniel Yoder said that he was questioned, but refused to answer the questions and several times repeated his request for an attorney (148-149, 160). Gray testified he recalled Langer mentioning Yoder's request for an attorney during the car ride (99).

After arrival at the F.B.I. office, Daniel Yoder was fingerprinted, photographed and gave information on his background (84, 102, 137, 152). He then requested a phone call and was allowed to call his father who told him not to answer questions until he had spoken to an attorney (102, 137-138, 152). He was then taken to an interview room in the F.B.I. office with agents Gray and Heiner and again given his "Miranda" rights. He refused to sign a written waiver and requested an attorney (25, 151, 161). Gray testified that Daniel Yoder then confessed to the bank robbery (26, 48). No written statement was prepared of this confession (28). Yoder testified he did not confess but did say he would show Gray some of the money from the bank robbery after being told this might help him with bail when he was arraigned (154-155, 169).

Daniel Yoder was then taken to the U.S. Courthouse for arraignment on the underlying indictment before the U.S. Magistrate in the late afternoon of November 18, 1976 (29-30). The Magistrate released the Defendant and his brother, Michael Yoder, who was also there for arraignment on personal recognizance bonds and instructed them to return the following morning for the assignment of counsel and the actual formal arraignment (5-6).

Daniel Yoder was then taken by Gray and another police officer back to Sardinia when he lead them to places where money allegedly from the robbery was recovered and Yoder was released by Gray (34-36, 167-169).

A hearing was held over several days and the Hon. John T. Elfin determined that the statements made by Daniel Yoder together with any evidence seized would be suppressed and not allowed at the trial of Daniel Yoder (223-236).

ARGUMENT

Daniel Yoder contends that U. S. District Court Judge John T. Elfin reached the proper conclusion from his findings regarding statements made by him to F.B.I. agents after his arrest and after several refusals to waive his rights and requests for an attorney. Judge Elfin made certain findings of fact including:

1. Daniel Yoder was arrested on November 18, 1976 at his home and taken to an F.B.I. agent's car.
2. He was advised of his "Miranda" rights in the car, understood them, and refused to sign a waiver.
3. On the way from his home to the F.B.I. office, he requested an attorney.
4. After arriving at the F.B.I. office, he telephoned his father and was told not to answer questions without an attorney.
5. He was again read his "Miranda" rights by F.B.I. agents, read the form, acknowledged he understood it, but refused to sign it.
6. He asked for an attorney and was told the Magistrate would have to appoint one.
7. Although F.B.I. agent Gray said Yoder then confessed, no written confession or transcript of an oral confession was made.
8. Yoder said he made a statement only because agents told him such would help him stay out of jail.

9. He was taken to the U. S. Magistrate that day, released on a \$5,000 recognizance bond, and told an attorney would be appointed the next day.
10. After leaving the Magistrate, Yoder lead F.B.I. agent Gray to secreted money seized as evidence.

It is Daniel Yoder's position that based on the above findings of fact, the Court correctly ruled that the F.B.I. agents did not scrupulously respect his right to counsel and that all pre-arraignment statements and the fruits of those statements obtained after the initial appearance before the Magistrate were properly suppressed.

POINT I

THE DEFENDANT HAD ASSERTED HIS SIXTH AMENDMENT RIGHT AND THE GOVERNMENT DID NOT MEET ITS "HEAVY BURDEN" TO SHOW A KNOWING AND INTELLIGENT WAIVER.

In the present case, the Defendant's right to counsel had clearly attached since he was arrested after an indictment charging him with bank robbery. Kirby vs. Illinois, 406 U.S. 682, 689 (1972). Once that privilege has attached, the government has a heavy burden of showing a knowing and intelligent waiver. Faretta vs. California, 422 U.S. 806, 835 (1975) quoting Johnson vs. Zerbst, 304 U.S. 458, 464-465 (1938). Any such waiver must also be viewed with skepticism. Michigan vs. Moseley, 423 U.S. 96, 110 (1975). This is especially so when there is no lapse of time between the request for an attorney and the waiver. U.S. vs. Clark, 499 F. 2d 802 (4th Cir., 1974).

When the facts of two refusals to sign waivers of his rights to counsel, at least two specific requests for an attorney, a telephone call to his father who advised him not to answer questions without an attorney, a supposed immediate untranscribed or oral confession after being told he could not have an attorney before going to the Magistrate, and discussion of telling where the money was to help with

bail are weighed against the standards set forth in the cases cited, it is clear the district court ruled correctly. The higher standard of U.S. vs. Satterfield, Docket No. 76-1372, 2nd Cir., December 7, 1976 for the waiver of counsel had attached and there was no valid waiver. This is especially true in view of the fact that as admitted, there was nothing prohibiting the F.B.I. agent Gray from taking the Defendant before the U.S. Magistrate when he requested an attorney at the F.B.I. office (47, L. 9-17). Yet Gray persisted in questioning the defendant and the question of bail was not impressive enough to him that he could remember whether and what he said to the defendant about it (51-52).

POINT II

THE STATEMENTS MADE AND THE EVIDENCE
SEIZED AFTER THE DEFENDANT'S INITIAL
APPEARANCE WERE PROPERLY SUPPRESSED.

When Daniel Yoder was finally brought before the
U.S. Magistrate on November 18, 1976, part of the statement
made by the Magistrate to the Defendants was as follows:

"...I'm going to advise you at this time
that that is the reason you have been brought
into court and neither of you are required to
make any statements to me or to anybody else,
either now or at any stage of these proceedings.
If either of you do make any statements, what-
ever that person says can be used against him.
You're both entitled to attorneys at all
stages of these proceedings and if either of
you claim that you do not have sufficient funds
of your own to hire an attorney you can apply
to the court for assignment of an attorney and
if we're satisfied that you don't have enough
money of your own to hire one we will assign
one to represent you without charge to you..."
(2-3)

This portion of the advice of rights is important
for two reasons. First, the Magistrate only referred to
statements during the court proceedings. Second, while
advising of the right to counsel, these warnings differ
from the "Miranda" warnings in that they do not tell the
Defendant he may remain silent until he speaks to an
attorney. The Magistrate then inquired about the

Defendant's financial status, told him to return the next morning for the assignment of an attorney, and released him on a \$5,000 personal recognizance bond at the request of the U.S. Attorney after being advised that there had been some cooperation and further cooperation was expected (5). Formal arraignment and assignment of counsel was put off until the next morning (6-7).

In view of the representations to the Court by the U.S. Attorney and the immediacy of the pre-arraignment statement and the post arraignment statement, the way the rights were read to the Defendant, and the fact the Defendant still had not been given an attorney, it is difficult to see how the government contends this was not a "fruit of the poisonous tree" and a separate knowing and intelligent waiver. As the district court found, they were the direct result of an unconstitutional inquiry.

Furthermore, there was no express waiver of the right to counsel to the court or to any agent after the arraignment appearance. There was also no further advising of the Defendant of his rights by the agents (54, 81).

CONCLUSION

For the reasons set forth, the decision of Judge Elfin should be affirmed.

Respectfully submitted,

JAMES P. HARRINGTON, ESQ.
Attorney for Appellee
Office and P.O. Address
474 Statler Hilton
Buffalo, New York 14202
Phone: (716) 855-3391

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-1263

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

AFFIDAVIT OF
SERVICE BY MAIL

-VS-

DANIEL YODER,

Defendant-Appellee.

STATE OF NEW YORK :
COUNTY OF ERIE : ss.
CITY OF BUFFALO :

CYNTHIA ANNE WOJTANIK, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at Lackawanna, New York.

That on September 20, 1977, deponent served the within [✓] ~~Brief~~ of Defendant-Appellee upon S. Daniel Fusaro, Clerk, U.S. Court of Appeals for the Second Circuit at New York, New York 10007, and a copy of same upon Richard J. Arcara, United States Attorney, Western District of New York, Edward J. Wagner, Assistant U.S. Attorney, Of Counsel, at 502 United States Courthouse, Buffalo, New York 14202, the addresses designated by said Clerk and United States Attorney for that purpose by depositing a true copy of same enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Cynthia Anne Wojtanik
CYNTHIA ANNE WOJTANIK

SWORN to before me this
20th day of September, 1977.

James P. Haggerty
JAMES P. HAGGERTY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

STATE OF NEW YORK, COUNTY OF

SS.:

Initial

☐ Certification
by Attorney

The undersigned attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

Initial

☐ Attorney's
Affirmation

The undersigned, an attorney admitted to practice in the courts of New York State, shows that deponent is
the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent
further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

SS.:

Initial

☐ Individual
Verification

being duly sworn deposes and says that
he in this action; that he read the foregoing
and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein
stated to be alleged on information and belief, and that as to those matters he believes it to be true.
being duly sworn, deposes and says that he is the

Initial

☐ Corporate
Verification

of
the corporation named in the within entitled action; that he has read the foregoing
and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein
stated to be alleged upon information and belief, and as to those matters he believes it to be true.
Deponent further says that the reason this verification is made by deponent and not by
is because the said
is a corporation and the grounds of deponent's belief as to all matters in the said
not stated upon his own knowledge, are investigations which deponent has caused to be made concerning the subject
matter of this and information acquired by deponent
in the course of his duties as an officer of said corporation and from the books and papers of said corporation.

Sworn to before me, this
day of 19

STATE OF NEW YORK, COUNTY OF

SS.:

☐ Affidavit
of Service
By Mail

being duly sworn, deposes and says: deponent is not a party to the action,
is over 18 years of age and resides at
On 19 deponent served the within
upon
attorney(s) for in this action, at
the address, designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office—official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit
of Personal
Service

On 19 at
deponent served the within upon
the
herein, by delivering a true copy thereof to him personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

☐ Description

The person served would be described as approximately years of age lbs. ft. in.
male female hair skin eyes other

Sworn to before me, this
day of 19

77-1263

Index No.

THE UNITED STATES OF AMERICA,

Plaintiff-Appellant,

- vs -

AFFIDAVIT OF
SERVICE BY MAIL

Year

DANIEL YODER,

Defendant-Appellee.

JAMES P. HARRINGTON, ESQ.
Attorney for Defendant-Appellee
Office and P.O. Address
474 Statler Hilton
Buffalo, New York 14202
Phone: (716) 855-3391

Personal Service of the within
hereon endorsed, is admitted this

day of

and of the notice (if any)
19

.....
Attorney(s) for

Sir:—Please take notice

Notice of Entry

that an
within entitled action on the
in the office of the Clerk of the County of

of which the within is a copy, was duly granted in the
day of 19 , and duly entered
on the day of 19

To
Attorney(s) for

